

## A VERY FEARFUL COURT?

### The protection of Fundamental Rights in the European Union after Opinion 2/13

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#### **Abstract**

In December 2014 the Court of Justice of the European Union found, in Opinion 2/13, that the Draft Agreement for the EU accession to the ECHR was not compatible with the Treaties; unfortunately, some of the grounds relied upon by the Court will be difficult to remedy in a new agreement, even should the other parties to the ECHR be willing to negotiate a new agreement. This contribution recalls the reasons why accession was deemed necessary, and engages in a critical analysis of the Court's ruling. In particular, it takes issue with the Court's approach to justice and home affairs, where the Court would like the accession agreement to somehow relieve the Member States of some of their ECHR obligation when giving effect to legislation based on 'mutual trust'. The article then suggests that the three political institutions should simply declare that they consider themselves bound by the ECHR and that they will act without delay when and if the European Court of Human Rights should find that a piece of Union law is incompatible with the Convention.

**Keywords:** Opinion 2/13; Fundamental Rights; EU; Accession; ECHR; International Agreements

#### **§1. INTRODUCTION**

It is well known that whilst all of the Member States of the European Union are signatories to the European Convention on Human Rights (ECHR), and subject to the jurisdiction of the European Court of Human Rights (ECtHR), the EU itself is not (formally) bound by the ECHR.<sup>1</sup> This fact has long provoked a debate in political, judicial and academic circles. Thus,

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<sup>1</sup> Article 52(3) of the Charter of Fundamental Rights of the European Union, [2012] OJ C326/391 (hereinafter the 'Charter'), provides that Charter rights which correspond to those guaranteed by the ECHR shall have the same meaning and scope as those laid down in the Convention (for a list of those rights see Explanations to the Charter, [2007] OJ C 303/17). Article 53 of the Charter provides that nothing in the Charter shall be interpreted as restricting or adversely affecting the rights guaranteed inter alia in the ECHR. Following the ruling in Case C-

even though the Court of Justice did (at least theoretically) fill the gap arising from the lack of any mention of fundamental rights in the original Treaties,<sup>2</sup> it was widely felt that the EU should be bound in its actions by limits equivalent to those that bind its Member States.<sup>3</sup> The debate thus proceeded along two, not mutually exclusive, lines: whether the EU should be equipped with its own catalogue of rights to bring transparency and clarity in human rights protection;<sup>4</sup> and whether it should accede to the ECHR.<sup>5</sup> Eventually, it was decided that both solutions were necessary:<sup>6</sup> the Treaty of Lisbon therefore provides that the Charter of Fundamental Rights has the same value as the Treaties; and Article 6(2) TEU provides not only the competence, but a duty for the EU to accede to the ECHR.

It was assumed that those changes would have a positive impact on fundamental rights protection in the EU, so that individuals would benefit from equivalent guarantees in relation to acts of the Union institutions as they do in relation to their own Member State: a system of ‘domestic’ (that is EU) fundamental rights protection, and the residual ‘safety net’ protection afforded by the European Court of Human Rights. And yet, fast forward to the end of 2014 and those assumptions might well be considered naïve at best, if not altogether misplaced: the case law on fundamental rights after the entering into force of the Charter seems, by and large, timid if not altogether regressive.<sup>7</sup> Furthermore, the priorities of the Court post-Charter have not changed: EU integration and the defence of the Court’s own hermeneutic monopoly seem to be the guiding principles before and above fundamental rights protection. And

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399/11 *Melloni v. Ministero Fiscal*, EU:C:2013:107, Article 53 of the Charter cannot be seen as a minimum guarantee.

<sup>2</sup> See for the development of the Court’s jurisprudence on fundamental rights Case 29/69 *Stauder*, EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114; Case 4/73 *Nold*, EU:C:1974:51.

<sup>3</sup> See Commission Memorandum on the Accession of the Communities to the European Convention on Human Rights, Bulletin of the European Communities, Supplement 2/79 COM(1979) 210 final.

<sup>4</sup> E.g. K. Lanaerts, ‘Fundamental Rights to be included in a Community Catalogue’, 16 *ELRev* (1991), p. 367, advocating also the possibility for the Court of Justice to request a ruling on the interpretation of provisions of the ECHR.

<sup>5</sup> It is interesting to note that in the 1979 Commission Memorandum, the Commission thought accession easier and more likely than a catalogue of rights. Of course accession / catalogue of fundamental rights dichotomy does not exhaust the range of solutions prospected by scholars; see e.g. A.G. Toth, ‘The European Union and Human Rights: the Way Forward’, 34 *CMLRev* (1997), p. 491, advocating the merging of the Council of Europe and the EU; P. Alston and J.H.H. Weiler, ‘An “ever closer Union” in need of a Human Rights policy’, 9 *EJIL* (1998), p. 658.

<sup>6</sup> E. Paciotti, ‘La Carta: I contenuti e gli autori’, in A. Manzella et al., *Riscrivere i diritti in Europa* (Il Mulino, 2001), links the drive towards EU codification of fundamental rights also to the Balkan wars of the 1990s.

<sup>7</sup> See e.g. the case law on the applicability of EU fundamental rights when an individual has exercised her Treaty rights and note how, in many recent cases, the Court has not analysed the compatibility of national rules falling within the Treaty with the Charter; e.g. Case C-86/12 *Alokpa*, EU:C:2013:645; Case C-456/12 *O. and B.*, EU:C:2014:135; Case C-457/12 *S. and G.*, EU:C:2014:136.

unfortunately, Opinion 2/13,<sup>8</sup> demonstrates the subsidiary interest of the Court in ensuring that EU citizens are fully protected, even when it is the EU rather than a Member State that acts. Thus, in that Opinion, the Court not only declared the draft agreement on the EU accession to the ECHR incompatible with the Treaties, but it also made any future accession very difficult if not altogether impossible.

This article draws on these themes: it starts by giving a brief account of why accession to the ECHR has been deemed (almost universally, albeit clearly with the exception of the CJEU) necessary (Section 2). It then briefly recalls the Draft Accession Agreement<sup>9</sup> (Section 3), and Opinion 2/13 (Section 4). In Section 5, the paper suggests a political solution to a legal problem, urging the three institutions to commit themselves to respecting the ECHR and the rulings of the European Court of Human Rights.

## **§2. THE NEED FOR EU ACCESSION TO THE ECHR**

It could be argued that, given the fact that the Charter has been given primary law status, accession to the ECHR is no longer necessary. However, accession of the EU to the ECHR would serve to remedy three distinct and yet related problems: first of all, and most obviously, it would remedy the lack of independent scrutiny over the acts of the EU institutions, affording individuals a protection equivalent to that which they enjoy in the domestic context. Secondly, it would provide clear jurisdiction to the ECtHR, hence putting an end to the *Bosphorus* anomaly. Thirdly, it would send an important signal both internally and externally. Internally, since it seems that fundamental rights protection (and the mutual trust that is to be founded on this core value) is not always as present to the Member States' minds as it might be hoped. Externally, as it would clarify to our international partners that the EU does as it predicates: given the fact that fundamental rights are under constant threat, the symbolic value of accepting external scrutiny is not to be underestimated. These three issues will now be elaborated.

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<sup>8</sup> Opinion 2/13 of the Court of 18 December 2014, EU:C:2014:2454.

<sup>9</sup> Council of Europe, Fifth Negotiation Meeting between the CDDH ad hoc negotiation group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Strasbourg 3 April 2013, 47+1(2013)008rev2 (hereinafter the Draft Accession Agreement). It is regrettable that the document has not been published on the Europa.eu website (which also means it has not been translated in the EU official languages).

## A. THE NECESSITY OF INDEPENDENT SCRUTINY

The idea behind the residual protection offered by the ECHR, through the jurisdiction of the European Court of Human Rights, is that even in mature democracies there might be mishaps in fundamental rights protection. The ECHR therefore aims to achieve two objectives: first, it ensures that the minimum of rights set by the Convention standard is upheld, by correcting the ‘mistake’ that occurred at national level. Secondly, the ECtHR ensures that inherent cultural biases that might lead to inappropriately weighing conflicting interests are addressed. The ECHR therefore introduces an element of pluralism in the assessment of state action that is vital in order to ensure that majoritarian discourse does not impact excessively or unduly on the rights of individuals. For those reasons, the ECHR is of pivotal importance not only to ‘younger’ democracies, but also to states that have a healthy record of fundamental rights protection, that are equipped with a fully independent judicial system and often also a constitutional court. It is clear that those considerations apply equally, and possibly more urgently, to the EU, an imperfect democracy with an imperfect judicial system, whose competences now extend to areas that are particularly fundamental rights sensitive (for example, criminal, asylum, and immigration law, and sanctions against individuals).

It is therefore immaterial that the EU courts already protect fundamental rights: the ECHR is not aimed at ensuring primary protection – that is the role of domestic courts (and of the EU courts in the EU context). Rather, and this seems a nuance lost in the CJEU’s understanding of the Convention system, the ECHR provides residual protection. Whilst it is certainly true that, like any other judicial actor, one might disagree from time to time with its interpretation of given rights, its function is unique and uniquely precious. In the EU context, some examples might well serve to illustrate the benefits of external scrutiny. Take for instance three distinct areas: the institutional structure of the EU; fundamental rights vis-à-vis integration bias; and the application of EU fundamental rights to national law.

In relation to the institutional structure of the EU, it is sufficient to recall the role of the Advocate General, which was questioned in the *Kaba* litigation. In the *Kaba II* case, the national court raised the question whether the fact that parties could not respond to the opinion of the Advocate General was compatible with Article 6 ECHR:<sup>10</sup> the case law of the European Court of Human Rights was in this respect not entirely clear as it had held that the

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<sup>10</sup> Case C-466/00 *Kaba v. Secretary of State for the Home Department* (Kaba II), EU:C:2003:127.

lack of rejoinder was compatible with Article 6(1) ECHR in some cases but not in others.<sup>11</sup> The Advocate General delivered a very strong opinion rejecting the challenge, and given the obvious bias, not an entirely persuasive one.<sup>12</sup> The Court of Justice decided to reverse the order of the questions and did not adjudicate on the compatibility of the Court's own structure with the ECHR, even though that question was of absolute relevance both for the proceedings under consideration and for the judicial architecture of the European Union. It is clear that in cases such as this, and given the basic principle pursuant to which nobody (not even a court) should be adjudicating on its own affairs, external scrutiny would be beneficial to the EU and its credibility.

In relation to the integration bias, that is the fact that fundamental rights might be sacrificed on the altar of allegedly superior interests in pursuing and/or enhancing European integration, the need for an external scrutiny is all the more necessary when the EU legislates in the areas of criminal, asylum and immigration law. Here, take the reticence of the Court of Justice to engage with the reservations expressed by national courts on the European Arrest Warrant's compatibility with fundamental rights;<sup>13</sup> or its quasi-religious belief in the adequacy, from a fundamental rights perspective, of all 28 national legal systems;<sup>14</sup> or its variable case law on the extent to which national authorities, including the courts, are bound by the Charter when implementing EU law.<sup>15</sup> For instance, when fundamental rights act as a proxy for furthering integration, the Court seems quite eager to impose on national court an obligation to apply EU fundamental rights on acts of domestic institutions: that was the case in *Carpenter*, where a rather remote connection with the free movement of services was instrumental in imposing EU fundamental rights on national authorities;<sup>16</sup> or *Åkerberg Fransson* where a remote

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<sup>11</sup> See ECtHR, *Vermeulen v. Belgium*, Judgment of 20 February 1996, Application No. 19075/91, where the ECtHR found that the fact that the parties could not reply to the submissions of the (Belgian) *Procureur Général's* opinion in proceedings before the *Cour de Cassation* infringed the right to adversarial proceedings and thus Article 6 ECHR. Compare with ECtHR, *Kress v. France*, Judgment of 7 June 2001, Application No. 39594/98, on the French *Commissaire du Gouvernement* (whose role is similar to that of the Advocate General). In this case the ECtHR found that fact that the parties are not informed in advance of the submissions of the *Commissaire du Gouvernement* and that they cannot reply to those submission did not constitute a breach of Article 6. The ECtHR stressed that i) it was open to the parties to ask the CG to indicate the general tenor of his submissions; ii) that it was open to the parties to reply to the CG by means of a memorandum for the deliberations (para 76). Consider that in the case of the AG's opinion that is not possible.

<sup>12</sup> Opinion of Advocate General Ruiz Jarabo Colomer in Case C-466/00 *Kaba II*, EU:C:2002:447; the Advocate General engages in a strong critique of the ECtHR's ruling in ECtHR, *Kress v. France*.

<sup>13</sup> E.g. Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, EU:C:2007:261; Case C-399/11 *Melloni v. Ministerio Fiscal*.

<sup>14</sup> See e.g. Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department*, EU:C:2011:865; and see discussion about mutual trust in [Section 4.\(B.\)](#) below.

<sup>15</sup> E.g. Case C-400/10 PPU *McB*, EU:C:2010:582; Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department*, EU:C:2011:865; and see also the discussion in [Section 4.\(B.\)](#) below.

<sup>16</sup> Case C-60/00 *Carpenter*, EU:C:2002:434.

connection between the legislation under consideration and internal market law, was sufficient to impose on the national court the application of EU fundamental rights.<sup>17</sup> On the other hand, when the application of EU fundamental rights would hinder the effective functioning of the EU regime, such as in the case of Dublin II and Brussels II Regulations,<sup>18</sup> or the European Arrest Warrant,<sup>19</sup> then the national executing court, even though is ‘implementing’ EU law, cannot apply EU fundamental rights.<sup>20</sup>

Finally, the expansion of the scope of EU fundamental rights to encompass a growing number of areas of national law clearly reinforces the need for accession. It should be recalled that pursuant to the case law of the CJEU, once a policy area is attracted within the ambit of EU law, national courts might be unable to apply their domestic standard of fundamental rights protection. This is the case even when the connection between EU law and national law is remote, as was the case in *Åkerberg Fransson*,<sup>21</sup> or triggered only by the exercise of a free movement provision, such as in *Schmidberger*,<sup>22</sup> *Viking*<sup>23</sup> and *Laval*.<sup>24</sup> Once the Court of Justice decides that the matter falls within the scope of EU law, it gains the hermeneutic monopoly over striking the balance between competing rights and interests. This, in turn, means that individuals are no longer protected by their domestic (constitutional) fundamental rights *and* that, lacking accession, they are also no longer protected by the ECHR. Similarly, when the EU decides to legislate, and lacking implementing discretion, it not only relocates the assessment of fundamental rights compliance from the national to the European courts, but it also subtracts, at least in theory,<sup>25</sup> that same assessment from the

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<sup>17</sup> Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105.

<sup>18</sup> Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (recast), [2013] OJ L 180/31 (Dublin II Regulation – previously Regulation 343/2003 – as modified also to take into account the *N.S.* ruling); Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, [2003] OJ L 338/1 (Brussels II Regulation).

<sup>19</sup> Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States, [2002] OJ L 190/1, consolidated version 28 March 2009 (European Arrest Warrant).

<sup>20</sup> See e.g. Case C-400/10 PPU *McB*, EU:C:2010:582 (although in that case the Court of Justice did assess indirectly the compatibility of the national provision in question with fundamental rights).

<sup>21</sup> Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105.

<sup>22</sup> Case C-112/00 *Schmidberger*, EU:C:2003:333.

<sup>23</sup> Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772.

<sup>24</sup> Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet et al.*, EU:C:2007:809.

*Schmidberger*, *Viking* and *Laval* can also be seen as cases displaying a rather string integration bias; on this point see E. Spaventa, ‘Federalisation versus Centralisation: tensions in fundamental rights discourse in the EU’, in M. Dougan and S. Currie, *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing, 2009), p. 343.

<sup>25</sup> See the next section for a brief summary of the case law of the European Court of Human Rights in relation to acts of the EU institutions.

scrutiny of the ECtHR.<sup>26</sup> Given the depillarization of co-operation in criminal law matters, this is even more worrying as it might result in a significant reduction of fundamental rights protection for Union citizens (see, for example *Melloni*).<sup>27</sup>

## B. THE *BOSPHORUS* ANOMALY

Another reason which militates in favour of accession is the need to provide a firmer, and more certain, jurisdiction for the European Court of Human Rights in relation to EU acts. Thus, although the EU is not yet party to the Convention, the ECtHR has refused to relinquish all jurisdiction in relation to EU derived legislation.<sup>28</sup> Whilst it is clear that - without accession - the ECtHR cannot hold the EU responsible for a violation of the ECHR, it has found that in some cases, it might hold the Member State who gave effect to the EU act responsible for a violation of the ECHR. In particular, in the case of *Matthews*,<sup>29</sup> the ECtHR found that when the CJEU does not have jurisdiction to assess a potential violation of fundamental rights, then the ECtHR will assert its jurisdiction (albeit in relation to the contracting party/parties rather than the EU) and examine the claim. This case law applies to complaints about the primary law of the EU and, probably, also to the Common Foreign and Security Policy in those cases where the Court of Justice lacks jurisdiction.<sup>30</sup>

Whilst this is a welcome development, it should be noted that a finding of incompatibility leaves the state against which the action was originally brought in a difficult position: as the EU is not a party to the ECHR it is not bound by the ECtHR ruling, so unless the claimant

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<sup>26</sup> Moreover, sometimes one wonders whether the decision to act through the EU rather than national action is not instrumental to avoiding fundamental rights guarantees. E.g. the system of EU terrorist lists, where the Council opted for an instrument in the then 3rd pillar (Common Positions) that was excluded altogether from the Court's jurisdiction, see generally E. Spaventa, 'Remembrance of Principles Lost: on Fundamental Rights, the Third Pillar and the Scope of Union Law', *25 Yearbook of European Law* (2006), p. 153-176.

<sup>27</sup> Case C-399/11 *Melloni v. Ministerio Fiscal*; N. De Boer, 'Addressing rights divergences under the Charter: *Melloni*', *50 Common Market Law Review* (2013), p. 1083.

<sup>28</sup> It is interesting to note that Judge Schermers, who was involved in the decision *M & Co v. Germany*, Decision of the European Commission of Human Rights, 9 February 1990 (1990) 64 ECmHRR 138 - in which the Commission refused jurisdiction to scrutinize a national act implementing a competition law decision -, wrote extra-judicially that the Commission's caution in that case was also due to the fact that Opinion 2/94 was pending, Opinion 2/94 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:1996:140. He also indicated that had the Commission already known the outcome of Opinion 2/94, it might well have shown less deference; see H.G. Schermers, 'The Human Rights Opinion on the ECJ and its Constitutional Implications', *CELS Occasional Paper no. 1*, [http://www.cels.law.cam.ac.uk/publications/occasional%20papers/Paper\\_1.pdf](http://www.cels.law.cam.ac.uk/publications/occasional%20papers/Paper_1.pdf). It might then not be by coincidence that following Opinion 2/94, the ECtHR started to assert - gradually - increasing jurisdiction over EU derived acts.

<sup>29</sup> ECtHR, *Matthews v. UK*, Judgment of 18 February 1999, Application No. 24833/94.

<sup>30</sup> Although unfortunately the ECtHR is not always clear as to whether the EU courts have jurisdiction; see e.g. ECtHR, *Segi and others v. 15 States of the EU*, Judgment of 16 and 23 May 2002, Application No. 6422/02 and 9916/02; and compare with Case T-338/02, *Segi et al v. Council*, EU:T:2004:171; and Case C-355/04 P *Segi et al v. Council*, EU:C:2007:116.

had addressed its grievance against all of the EU Member States, only one Member State would be bound by the ruling, even though it would not be in its power to unilaterally remedy the breach.

In relation to other EU legislation, the ECtHR in *Bosphorus*<sup>31</sup> has used a *Solange*-type approach,<sup>32</sup> so that whilst it shows deference to the EU by refraining to assert full jurisdiction against Contracting Parties for the acts of the EU, on the basis that the latter offers equivalent protection to the ECHR, it has also held that it is open to applicants to show that in a particular case the protection of Convention rights was ‘manifestly deficient’. The *Bosphorus* compromise - which is more pervasive than the national equivalent, but less extensive than the exercise of full jurisdiction would be - is just that: a compromise. The rights of individuals are protected, but less so than they would be should the EU accede to the Convention. The bar (the ‘manifestly deficient’ criterion) is higher than it would be normally since the breach of Convention rights becomes a procedural requirement. As such, and because otherwise the scrutiny over jurisdiction and the scrutiny on the substance of the case would be identical, it is limited to cases in which the applicant can prove a prima facie (significant) breach. Furthermore, also in this case, a finding of incompatibility is of limited use, since a single Member State cannot unilaterally amend EU law.<sup>33</sup>

So far, the *Bosphorus* case law has not been relaxed. Yet, within those constraints, the ECtHR has been willing to exercise its supervisory role: for instance, a piece of national legislation reproducing word for word the provisions of a Union law instrument is not subtracted from the scope of the Convention.<sup>34</sup> Whenever the Member State is exercising a discretion in implementing a piece of EU law, it is fully bound by the ECHR and subject to its mechanisms.<sup>35</sup> Finally, the ECtHR has also found that Article 6(1) ECHR imposes upon EU Member States’ national courts of last instance a duty to provide reasons when rejecting a request to make a preliminary reference pursuant to Article 267 TFEU to the CJEU.<sup>36</sup> And

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<sup>31</sup> ECtHR, *Bosphorus v. Ireland*, Judgment of 30 June 2005, Application No. 45036/98.

<sup>32</sup> German Constitutional Court, *Wünsche Handelsgesellschaft (Solange II)*, BVerfGE 73, 339 2 BvR 197/83; see also Italian Constitutional Court, *Sentenza 7/3/64*, no. 14 (in F. Sorrentino, *Profi li Costituzionali dell’Integrazione Comunitaria* (2<sup>nd</sup> edition, Giappichelli Editore, 1996), p. 61 et seq.); and *Società Acciaierie San Michele v. High Authority* (27 December 1965, no. 98), [1967] *Common Market Law Report* 160.

<sup>33</sup> This being said, one would hope that if a comparable situation would arise, the Court of Justice would in any event take the opportunity to annul the relevant piece of EU legislation as incompatible with the Charter as per Article 52(3) of the Charter.

<sup>34</sup> ECtHR, *Cantoni v. France*, Judgment of 11 November 1996, Application No. 17862/91, para. 30.

<sup>35</sup> Case ECtHR, *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, Application No. 30696/09, para. 340.

<sup>36</sup> E.g. ECtHR, *Dhahbi v. Italy*, Judgment of 8 April 2014, Application No. 17120/09.



that failure to refer a question for preliminary reference impacts on the presumption of equivalence and therefore triggers the jurisdiction of the ECtHR also in relation to acts of Member States implementing EU law where there was no discretion left to national authorities (pure EU acts).<sup>37</sup>

### C. THE BROADER CONTEXT: LEADING BY EXAMPLE (OR NOT?)

The third reason why accession to the ECHR (and the adoption of the Charter) is considered necessary is to ensure some coherence between what the EU requires of acceding Member States and international partners on the one hand, and its own behaviour, on the other. Thus, starting from the mid-1990s, the scholarship has noted how the Copenhagen criteria, which impose fundamental rights compliance as a condition for accession,<sup>38</sup> as well as the increased use of human rights conditionality clauses in international agreements between EU and third countries,<sup>39</sup> was at odds with the EU's own behaviour in relation to fundamental rights. The Charter, of course, goes a long way in addressing those objections, and yet the lack of external scrutiny on the EU's own fundamental rights record is of course, noted, not least since the case law of the CJEU on fundamental rights protection is variable.<sup>40</sup>

The gap between what the EU requires from others and what it does itself would be, in itself, a very powerful reason for accession. And yet, there is another reason for accession, and this relates to the EU's ambition to be a community of states which, first and foremost, is based on the common values listed in Article 2 TEU, values which are all closely linked to the respect of fundamental rights. It is this 'common basis' that allows for co-operation in human

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<sup>37</sup> ECtHR, *Michaud v. France*, Judgment of 6 December 2012, Application No. 12323/11, para. 115.

<sup>38</sup> Presidency Conclusions Copenhagen European Council, (SN 180/1/93 REV 1), [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/72921.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf).

<sup>39</sup> See generally L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005); L. Bartels, 'The Application of Human Rights conditionality in the EU's bilateral Trade agreements and other trade arrangements with third countries', Report prepared at the request of the European Parliament's Committee on International Trade (2008), [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2008/406991/EXPO-INTA\\_ET\(2008\)406991\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2008/406991/EXPO-INTA_ET(2008)406991_EN.pdf).

<sup>40</sup> Examples of the Court of Justice taking rights 'seriously' are for instance those relating to the freezing of assets of individuals and organisations suspected of having links with terrorist groups; e.g. Case C-402/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, EU:C:2008:461; Case T-204/08 *People's Mojahedin Organization of Iran v. Council of the European Union*, EU:T:2008:550; other cases demonstrate a more restrictive approach to fundamental rights; e.g. Case C-122/99 and C-125/99 *D and Sweden v. Council*, EU:C:2001:304; and compare with the interpretation given by the ECtHR in ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Judgment of 21 December 1999, Application No. 33290/96; <sup>40</sup>-Case C-540/03 *Parliament v. Council* (family reunification directive), EU:C:2006:429; Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*.

rights sensitive fields, such as immigration and co-operation in criminal law. It is this (alleged) common basis that is at the heart of the mutual trust (so dear to the Court) between Member States in relation to judicial co-operation; and it is this common basis that is the foundation for the European Arrest Warrant, and the Dublin II and Brussels II Regulations. Furthermore, it is this ‘common basis’ that justifies Article 7 TEU. After all, if the EU is a community of like-minded states insofar as fundamental rights protection is concerned, and if it is the existence of these common values that justifies EU coordinating action in the judicial sphere, then it is only right that Member States might face scrutiny over their fundamental rights record.<sup>41</sup> If this is so, if the EU demands fundamental rights compliance from its Member States even beyond fields that are harmonized or affected by EU law, then it appears inconsistent for the EU not to subject itself to external scrutiny. This is even more the case at a moment when the post-war drive for fundamental rights protection might be losing steam.

The EU accession to the ECHR would have then remedied those problems, as well as sending out a very important signal internally and internationally as to the centrality of fundamental rights protection for the integration project.

### **§3. THE DRAFT ACCESSION AGREEMENT**

The Accession Agreement had to address two main problems: first of all, how to reconcile accession of a supranational body to a convention designed for states. In particular,<sup>42</sup> and given the complexities and peculiarities of the EU legal architecture, it needed to ensure that (i) the competences of the EU would not be expanded through accession;<sup>43</sup> (ii) the obligations of the Member States would not change because of accession;<sup>44</sup> and (iii) individuals would not be caught in an impossible web of uncertainty in determining who was the body actually

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<sup>41</sup> This said, Article 7 TEU has never been used even if Member States have not always paid attention to the ECHR (and EU) obligations; see e.g. European Parliament Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI)), (P5\_TA(2004)0373), [2004] OJ C 104/1026.

<sup>42</sup> The Council decision authorizing the negotiations for accession was at first classified; following a successful challenge by Professor Besselink (Case T-331/11 *Besselink v. Council*, EU:T:2013:419) it was declassified, see Draft Council Decision authorizing the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 9698/10 DCL 1 REV1 (the negotiating directive).

<sup>43</sup> Article 6(2) TEU; Article 2 Protocol 8 Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms; para 1(a) negotiating directive.

<sup>44</sup> Article 2 Protocol 8; para. 1(c) negotiating directive.

responsible for the alleged violation.<sup>45</sup> Thus, as explained in the draft explanatory report to the draft agreement,<sup>46</sup> the EU position is unique in that the legal basis for an act and the executor of that same act might be ascribable to different entities (EU/Member State and vice versa).

Secondly, the Court of Justice made it reasonably clear that it would not tolerate being deprived of the possibility of preliminary scrutiny over the compatibility with fundamental rights of EU law.<sup>47</sup> The Accession Agreement therefore needed to take this into account since the Court of Justice de facto had an indirect veto on the agreement, as it is for the Court to declare the compatibility of the latter with the Treaties (either in a preliminary opinion; or in direct or indirect challenges to the validity of the agreement).

The Draft Accession Agreement attempted to address these concerns through a carefully thought (if not perfect) mechanism. It therefore provided the following:

- Accession would impose obligations only in relation to acts, measures or omission of the EU institutions, bodies, offices or agencies, and of persons acting on their behalf. It would not require the EU to perform an act for which it has no competence (Article 1(3)).
- Acts of the Member States should, for the purposes of the Convention, always be attributed to the Member States, even when adopted in the implementation of an EU act (or Treaty provision). In cases where the EU was a co-respondent, the EU could also be held responsible for a violation of the Convention (Article 1(4)).
- The EU could join as a co-respondent in proceedings directed against one or more of its Member States when it ‘appear[ed]’ that such allegation called into question the compatibility of the Convention of a provision of EU law (Article 3(2)).<sup>48</sup>

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<sup>45</sup> Article 1(b) Protocol 8; para. 10 negotiating directive.

<sup>46</sup> Appendix V, Draft Accession Agreement ~~(see footnote 9)~~.

<sup>47</sup> See joint press release by Presidents Costa and Skouris, 17 January 2011,

[http://www.echr.coe.int/Documents/UE\\_Communication\\_Costa\\_Skouris\\_ENG.pdf](http://www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf).

<sup>48</sup> A procedure reminiscent of the co-respondent mechanism was already anticipated in 2002, see Council of Europe, Study of technical and legal issues of a possible EC/EU Accession to the European Convention on Human Rights, Report adopted by the Steering Committee for Human Rights (CDDH) at its 53<sup>rd</sup> meeting (25-28 June 2002), DG-II(2002)006[CDDH(2002)010 Addendum 2], especially para. 57 ~~and~~-et seq.

- Conversely, in cases addressed to the EU, Member States could join as co-respondent if the case concerned the compatibility with the Convention of a Treaty provision, or a provision of equal status to the Treaties. (Article 3(3))
- The EU/Member States could become co-respondent either by invitation or by a decision of the ECtHR, both taken after seeking the views of the parties to the proceedings. The ECtHR involvement would be limited to assess whether it was ‘plausible’ that the conditions for EU/Member States to become co-respondent were met (Article 3(4)).
- In those cases in which the EU was a co-respondent and the CJEU had not yet had the chance to examine the compatibility of the EU provision in question with the rights defined in the Convention, then ‘sufficient time’ would be afforded to the Court of Justice to make such an assessment (Article 3(6)).

#### §4. OPINION 2/13

The Court of Justice delivered a negative opinion in relation to the compatibility of the Draft Accession Agreement with the Treaties and Protocol 8.<sup>49</sup> The Opinion can be usefully divided in three different parts: (i) the preservation of the *Melloni* doctrine; (ii) the defence of EU exceptionalism; and (iii) institutional/procedural issues.<sup>50</sup> All in all, Opinion 2/13 is disappointing for two different reasons. It is obviously disappointing because of its significance for the protection of human rights in Europe. But it is also disappointing because

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<sup>49</sup> There have been some excellent analysis and suggestions following Opinion 2/13; see e.g. S. Peers, ‘The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection’, *EU Law Analysis* (2014), <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.htm>; L. Besselink, ‘Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13’, *Verfassungsblog* (2014), <http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/>; S. Douglas-Scott, ‘Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice’, *UK Constitutional Law Association* (2014), <http://ukconstitutionalaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>; D. Halberstam, ‘“It’s the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on the Accession of the EU to the ECHR, and a Way Forward’, available on [www.ssrn.com](http://www.ssrn.com); P. Gragl, ‘The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR’, available on [www.ssrn.com](http://www.ssrn.com).

<sup>50</sup> The Court divided the issues in two categories: (i) ‘whether the agreement envisaged is liable to adversely affect the specific characteristics of EU law (...) and (...) the autonomy of EU law in the interpretation and application of fundamental rights, as recognized by EU law and notably by the Charter’ (emphasis added); and (ii) whether ‘the institutional and procedural machinery’ envisaged in the agreement ensures that the ‘conditions in the Treaties for the EU’s accession to the ECHR are complied with’ (Opinion 2/13, para. 179). The first and second of our categories fall within the Court’s first category; our third category corresponds to the Court’s second category.

it shows the Court's profound distrust of both national courts (and their compliance with the principle of loyal cooperation) and of the European Court of Human Rights. This is notwithstanding the fact that, as mentioned above, the latter's case law on the link between preliminary references and Article 6(1) of the Convention has further strengthened the obligation of national courts to request a preliminary ruling, or adequately motivate a refusal to do so.

#### A. PRESERVING THE *MELLONI* DOCTRINE

After having recalled the fact that accession would bind the Member States as well as the EU,<sup>51</sup> the Court proceeded to take issue with the 'external control' provided by the Convention. In particular, it stated that decision-making powers by the ECtHR must not have the effect of binding the EU to a particular 'interpretation of EU law'. Thus, the Court held that 'it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU'.<sup>52</sup>

The Court then stated that Article 53 of the Charter (as interpreted in *Melloni*) means that Member States, when acting within the scope of Union law, might not be able to apply higher standards than those provided for by the Charter as interpreted by the Court.<sup>53</sup> It then argued that since Article 53 ECHR provides that Contracting Parties can always provide a higher standard of protection than that guaranteed by the Convention, those two provisions need to be coordinated. That is to ensure that the 'level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised'.<sup>54</sup>

This objection reflects the anxiety of the Court as to the acceptance of the *Melloni* doctrine by national judiciaries. Yet, the Court's reasoning is not particularly persuasive: the Member

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<sup>51</sup> Albeit only in fields in which the Member States are implementing EU Law, something that the Court omits. See Protocol 8 Article 2, which provides that nothing in the Accession Agreement shall affect 'the situation of Member States in relation to the Convention'. Article 1(3) of the Accession Agreement provides that 'Accession to the Convention (...) shall impose on the European Union obligations with regard *only* to acts, measures or omissions of *its* institutions, bodies, offices or agencies, or of persons acting on their behalf' (emphasis added). Article 1(4) of the -Accession Agreement provides that an act of a Member State, for the purposes of the Convention, must be attributed to that State even when the State is implementing EU law.

<sup>52</sup> Opinion 2/13, para. 186.

<sup>53</sup> Member States would never be able to fall below the protection provided for in the Charter in fields occupied by Union law; see pre-Charter, e.g. Case C-60/00 *Carpenter*, ECLI:EU:C:2002:434.

<sup>54</sup> Opinion 2/13, para. 189.

States might, in certain instances, be under an EU law obligation not to apply standards above those provided for by the Charter; the Charter cannot fall below the ECHR standards but it can provide that same level of protection. Whilst it is true that the Member States would be able to provide more generous protection as a matter of Convention law, they would not be able to do so as a matter of EU (primary) law. Article 53 ECHR provides discretion on Contracting Parties (if they wish they may provide a more generous protection). It does not provide an obligation. There is therefore no possibility of clash between the two Articles.

The same concern towards ensuring that in matters falling within the scope of EU law national courts do not get ‘confused’ over which standard of protection is applicable is visible in the Court’s objection to Protocol 16 ECHR which allows the national highest courts and tribunals to request an advisory opinion from the ECtHR. In the eyes of the Court, and even though the Protocol was not part of the Accession Agreement, the possibility to request an advisory opinion might interfere with the national courts’ duties to request a preliminary reference.<sup>55</sup> The Court fears that in cases falling within the scope of EU law, where the ECHR and the Charter would apply concurrently, national courts might be tempted to require an opinion from the ECtHR rather than a preliminary ruling from the Court of Justice.

The objection to Protocol 16 however seems moot if one considers that the power of the national highest court to request an advisory ruling is a discretion which therefore should not, pursuant to the principle of loyal cooperation and Article 267 TFEU, be exercised at the expense of the CJEU’s jurisdiction.<sup>56</sup> Furthermore, realistically, it is not clear what interest would a national highest court have in requesting an advisory opinion from the ECtHR, rather than a preliminary ruling from the Court of Justice. The latter will presumably continue to be speedier; it provides for the possibility to request an interpretation of the EU provisions in question beyond their compatibility with fundamental rights; and it might yield to a more satisfactory result given that the Court of Justice is, and would continue to be also after accession, the only court which might declare an act of the EU institutions invalid.

## B. EU EXCEPTIONALISM

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<sup>55</sup> This of course raises the question as to whether the duty of loyal co-operation might not impose on Member States the obligation of non-ratification of the Protocol in its current form.

<sup>56</sup> In fact a deep distrust of national courts is also apparent in the mechanism (demanded by the Court) through which the European Court of Human Rights would give sufficient time to the CJEU to decide on compatibility of the EU act under consideration with the Convention in cases in which it had not done so previously. On this issue see E. Spaventa, ‘Fundamental Rights in the European Union’, in C. Barnard and S. Peers, *EU Law* (OUP, 2014), section 5.2.2.

Secondly, and perhaps more worryingly, the Court demands that any draft agreement should provide for some sort of EU exceptionalism, i.e. some special treatment of the EU.<sup>57</sup> Here the Court is concerned about legislation adopted in the context of the Area of Freedom, Security and Justice; and its own lack of jurisdiction in the Common Foreign and Security Policy.

In relation to the Area of Freedom, Security and Justice, the Court reasons as follows: the EU is based on mutual trust between Member States; in the Area of Freedom Security and Justice this means that Member States (save in exceptional cases) must consider that their counterparties respect fundamental rights as recognized by EU law. As a result, Member States may be required not only to presume compliance, but also to avoid checking in specific cases whether fundamental rights guaranteed by the EU have actually been observed.<sup>58</sup> The Court then continued:

The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the *intrinsic nature of the EU* and, in particular, it fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the *exclusion*, if EU law so requires, of *any other law*.<sup>59</sup>

Insofar as accession would require Member States to check that another Member State observes fundamental rights even when ‘EU law imposes an obligation of mutual trust’, then ‘*accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law*’.<sup>60</sup>

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<sup>57</sup> These demands are even more worrying given the fact that in some Member States, notably the UK, the ECHR system is under considerable attack. In particular, see The Conservatives, ‘Protecting Human Rights in the UK’, *The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014), [https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN\\_RIGHTS.pdf](https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf), in which the British Conservative party challenges the need for the external scrutiny performed by the European Court of Human Rights. In their view, following the repeal of the Human Rights Act 1998, the European Court of Human Rights would become an ‘advisory body’; fundamental rights would only be able to be used in the more serious matters (a threshold mechanism) and should those changes not be acceptable to the Council of Europe, then the UK would ‘be left with no alternatives than to withdraw from the European Convention on Human Rights’. In many ways, the Conservative Party’s objections are not so different from the approach of the CJEU, and so not surprisingly Mr Chris Grayling, the current Justice Secretary, has welcomed Opinion 2/13, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-xxix/21909.htm>.

<sup>58</sup> Opinion 2/13, para. 192.

<sup>59</sup> Opinion 2/13, para. 193; (emphasis added).

<sup>60</sup> Opinion 2/13, para. 194 (emphasis added).

The reason for the Court's closure can be easily explained having regard to the peculiarities of some of the legislation adopted in the Area of Freedom, Security and Justice. In particular, instruments like the European Arrest Warrant, the Dublin II Regulation and the Brussels II Regulation, aim to coordinate the legal systems of the Member States in order to ensure a speedier resolution of claims which have some cross-border connection. In relation to those instruments, the CJEU has carved an exception to its case law on fundamental rights protection: if EU fundamental rights must always be applied to national acts implementing or giving effect to EU law, that is not the case in relation to coordinating instruments. Rather, national courts, in order to preserve the effectiveness of EU law might be under a duty *not* to perform a fundamental rights scrutiny,<sup>61</sup> *or* to limit such scrutiny to the most extreme of violations.<sup>62</sup>

This approach is justified, in the eyes of the Court, by the 'high degree of confidence which *should* exist between the Member States'.<sup>63</sup> Thus, the national court that is executing a European Arrest Warrant must presume that fundamental rights will be respected by the issuing authorities; the same applies to a national court which is enforcing a ruling under the Brussels II Regulation,<sup>64</sup> and, more controversially, in relation to decisions returning asylum seekers to their first port of entry. It is in relation to the latter category - asylum seekers - that the presumption of fundamental rights compliance has come under strain through the intervention of the ECtHR.

In particular, in the case of *M.S.S.*,<sup>65</sup> the ECtHR found that since there is a reserve of sovereignty whereby a Member State can always decide to assess an asylum request, even when it is not a designated authority under the Regulation, the Convention applies to the exercise of that discretion. In other words, whenever a Member State returns an asylum seeker to another Member State under the Dublin II system, it has to consider whether the asylum seekers' Convention rights would be breached. Whilst the European Court of Human Rights has accepted that Member States might be satisfied that the responsible Member State 'apparently' complies with the Convention,<sup>66</sup> 'the States must make sure that the

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<sup>61</sup> See e.g. Case C-396/11 *Radu*, EU:C:2013:39; Case C-400/10 PPU *McB*, EU:C:2010:582.

<sup>62</sup> Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department*, EU:C:2011:865.

<sup>63</sup> Case C-399/11 *Melloni*, para. 37 (emphasis added).

<sup>64</sup> And for the ECtHR acceptance of the Brussels II system, see ECtHR, *Povse v. Austria*, Judgment of 18 June 2013, Application No. 3890/11.

<sup>65</sup> ECtHR, *M.S.S. v. Belgium and Greece*.

<sup>66</sup> ECtHR, *T.I. v. United Kingdom*, Judgment of 7 March 2000, Application No. 43844/98; ECtHR, *K.R.S. v. the United Kingdom*, Judgment of 2 December 2008, Application No. 32733/08.



intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention'.<sup>67</sup>

In the ruling in *Tarakhel*,<sup>68</sup> the ECtHR further extended the Convention obligations of the Member States when applying the Dublin II Regulation. In that case, the Court found that in a case relating to a family with six children, Switzerland was under a Convention obligation to seek assurances from Italy (the port of first entry) that the family would be kept together and accommodated in a manner suitable to the age of the children.

The Court of Justice has given a narrow interpretation of the *M.S.S.* obligation to ensure that Convention rights would not be breached by the Member State responsible to assess the asylum application. In the *N.S.* ruling, after having reiterated that the entire point of the Dublin II system is to ensure a speedy resolution of asylum claims (and to avoid forum shopping), the CJEU limited the obligation of Member States to assert jurisdiction over asylum claims of individuals who could otherwise be returned to another Member State to circumstances in which:

there are *substantial* grounds for believing that there are *systemic flaws* in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, *resulting in inhuman or degrading treatment*, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State.<sup>69</sup>

It is in this light that the Court's demand for a special arrangement for rules adopted within the Area of Freedom Security and Justice should be understood: in the Area of Freedom, Security and Justice the Court wants to avoid the full application of the Convention since, if the ECHR were to be applied in full, then the Member State where the individual is located would have to assure itself that rendition to the State having jurisdiction under the Regulation would not breach the claimants' Convention rights. Furthermore, it appears that the Court, via its demands, is also attempting to limit the existing case law of the ECtHR. Leaving aside

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<sup>67</sup> ECtHR, *M.S.S. v Belgium and Greece*, para. 342.

<sup>68</sup> ECtHR, *Tarakhel v. Switzerland*, Judgment of 4 November 2014, Application No. 29217/12; see also ECtHR, *Sharifi and Others v. Italy and Greece*, Judgment of 21 October 2014, Application No. 16643/09, finding that the immediate deportation to Greece of asylum seekers who had entered Italy illegally from Greece breached the Convention.

<sup>69</sup> Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department*, para. 86 (emphasis added). See also Case C-394/12 *Shamso Abdullahi v. Bundesasylamt*, EU:C:2013:813, for a very narrow interpretation of the state's obligations under the Charter and the Convention. The new Dublin II Regulation reproduces the wording of the Court of Justice, hence providing less generous protection than that demanded by the ECtHR in the *M.S.S.* ruling; see Regulation 604/2013, Article 3(2).

considerations as to the wisdom of interfering with the Court of Human Rights interpretation of the Member States obligation pursuant to the ECHR, one might well reflect upon whether the ‘mutual trust’ upon which the Court has founded its ‘hands-off’ approach in its case law can really be relied upon in order to justify rules which might have a significant impact on the rights of individuals, as protected by the Charter as well as the Convention.

In this respect, the presumption of minimum fundamental rights compliance appears to be based more on legal fiction than on facts:<sup>70</sup> just to name a few, take the situation in Bulgarian prisons;<sup>71</sup> the situation in Hungary in relation to freedom of expression and the independence of the judiciary;<sup>72</sup> the mistreatment of the Roma minorities in many of the Member States;<sup>73</sup> the persistent violation of Article 6(1) ECHR by Italy, due to the excessive length of proceedings;<sup>74</sup> the treatment of asylum seekers, especially in Mediterranean countries where the influx is greater.<sup>75</sup>

In any event, the presumption of fundamental rights compliance could be justified only insofar as the EU was willing (or able) to compel its Member States to respect fundamental

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<sup>70</sup> See generally e.g. Human Rights Watch, ‘Annual Report 2015’, *Website of Human Rights Watch* (2015), [http://www.hrw.org/sites/default/files/wr2015\\_web.pdf](http://www.hrw.org/sites/default/files/wr2015_web.pdf).

<sup>71</sup> Council of Europe, ‘Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March To 3 April 2014’, *Website of the Council of Europe* (2014), <http://www.cpt.coe.int/documents/bgr/2015-01-29-eng.htm>.

<sup>72</sup> Council of Europe, Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Hungary, from 1 to 4 July 2014, CommDH(2014)21, [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH\(2014\)21&Language=lanEnglish&Ver=original&BackColorIntranet=DBC2F2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2014)21&Language=lanEnglish&Ver=original&BackColorIntranet=DBC2F2&BackColorIntranet=FDC864&BackColorLogged=FDC864)); see also Human Rights Watch, ‘Annual Report 2015’, *Website of Human Rights Watch* (2015);

[http://www.hrw.org/sites/default/files/wr2015\\_web.pdf](http://www.hrw.org/sites/default/files/wr2015_web.pdf); European Parliament resolution of 10 March 2011 on

media law in Hungary, **available at:**

[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN)

[0094+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN); Resolution of 5 July 2011 on the Revised Hungarian Constitution, **available at:**

[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN)

[0315+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN). The Commission also brought two cases to address some of the problems arising from the Hungarian reforms; Case C-286/12 *Commission v Hungary*, EU:C:2012:687, on the mandatory retirement of judges; and Case C-288/12 *Commission v Hungary*, EU:C:2014:237 on the national supervisory authority for data protection; in both cases the Court found that Hungary had failed to fulfill its obligations.

<sup>73</sup> See generally, the website of the European Roma Rights Centre, <http://www.errc.org/>; and in particular the report on forced expulsions perpetrated by France: ERRC, ‘Census: Forced evictions of migrant Roma in France’, *Website of the European Roma Rights Centre* (2014), <http://www.errc.org/article/violent-unfair-unlawful-and-shameful-france-evicted-close-to-3-romani-settlements-per-week-in-2014/4351>; see European Union Agency for Fundamental Rights, ‘Opinion 1/2013 on the situation of equality in the European Union 10 years on from the initial implementation of the Equality directives’, *Website of the European Union Agency for Fundamental Rights* (2013), [http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf).

<sup>74</sup> See e.g. ECtHR, *Cocchiarella v. Italy*, Judgment of 29 March 2006, Application No. 64886/01, especially para. 65 **and** et seq.

<sup>75</sup> See the abolition of the *Mare Nostrum* operation by the Italian Government. On 11 February 2015, more than 300 people died trying to reach the Italian shores and the high number of deaths has been directly linked to the abolition of the patrol system.

rights. And yet, this is not the case for two reasons: first of all, the Council has never used its powers under Article 7 TEU to reprimand or sanction a Member State for a ‘clear risk of a serious breach of fundamental rights’ or for the ‘existence of a serious and persistent breach’ of fundamental rights. This has been the case even though some countries have given rise to very serious general (for example, Hungary) or sectorial (for example, Greece, Italy, France) concerns as to fundamental rights compliance. Thus, Article 7 TEU, due to its inherently political nature, appears not apt to guarantee that basic uniformity that should be the foundation upon which mutual trust can be built.

In relation to the potential to compel Member States to respect fundamental rights, it should be noted that EU fundamental rights apply only when Member States are implementing EU law, therefore rendering an action for infringement difficult (albeit not impossible). Moreover, and even though there are sectorial pieces of legislation which touch upon human rights (such as the non-discrimination directives),<sup>76</sup> infringement proceedings for quite blatant violation of discrimination rules in relation to the Roma population have been slow to come.<sup>77</sup>

Thus, if there is no effective way to monitor fundamental rights compliance in the EU, why should mutual trust be elevated to a ‘supreme’ interest/principle in human rights-sensitive areas? This is not the internal market, where it is reasonable to expect that since Member States have little interest in putting their citizens at risk, they might be trusted to do a reasonable job at regulating the market.<sup>78</sup> In the field of criminal law, and even more so in the fields of asylum and immigration, measures are, usually, adopted against the weakest and most disenfranchised individuals: the presumption of fundamental rights compliance therefore seems naïve at best.

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<sup>76</sup> Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22; Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

<sup>77</sup> See European Union Agency for Fundamental Rights, ‘Opinion 1/2013 on the situation of equality in the European Union 10 years on from the initial implementation of the Equality directives’, *Website of the European Union Agency for Fundamental Rights* (2013), [http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf). The BBC reported on 28 October 2014 of infringement proceedings being brought against the Czech Republic for segregated schooling of Roma children, R. Cameron, ‘Roma complain of Czech school segregation’, *Website of the BBC* (2014), <http://www.bbc.com/news/world-europe-29742282>. Yet, the website of the Commission fails to include any mention of this action, even in its portal dedicated to the Roma situation.

<sup>78</sup> Even in internal market cases and lacking harmonization, Member States are able to rely on Treaty derogations and mandatory requirements to protect the interest of their consumers.

For these reasons the ‘mutual trust’ objection is particularly worrying: first, because it seeks to remove the basic net of fundamental rights protection provided for in the ECHR, where it is needed the most. Secondly, because it is difficult to accommodate in a new Accession Agreement (on this point see further below).

The same (insurmountable) exceptionalism is present in relation to the Court’s objection to the jurisdiction of the ECtHR over Common Foreign and Security Policy matters when the Court of Justice does not have any. Here, Advocate General Kokott examined the issue from a judicial protection perspective: in particular, she relied on the fact that even when the Court of Justice does not possess jurisdiction, the national courts act as EU courts in order to ensure effective judicial protection. Therefore, a Common Foreign and Security Policy issue would have been considered by national courts, which are part of the EU judicial architecture, before reaching the ECtHR. The Court of Justice, however, does not share this view of an integrated judicial system in the EU, where the responsibilities for the protection of individuals are shared between national and European courts.<sup>79</sup> Rather, it signals that the Accession Agreement would only be acceptable insofar as it excluded the jurisdiction of the ECtHR on the Common Foreign and Security Policy (which would be inconsistent with Article 57(1) ECHR)<sup>80</sup> or if the Treaties were amended also to confer jurisdiction over the CFSP on the CJEU, which is difficult given that some Member States (notably the UK and France) are very unlikely to agree to such a Treaty amendment.

Furthermore, the Court’s objections in relation to the CFSP appear to be rather pointless given that the ECtHR has already asserted jurisdiction when the Court of Justice has none.<sup>81</sup> More importantly, the Court is indicating that it would rather accept that an individual were entirely devoid of judicial protection than have another body looking at compliance with an international convention.<sup>82</sup>

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<sup>79</sup> Which is ironic, given the Court’s stance in relation to judicial review proceedings that the *Plaumann* test does not leave a gap in protection since individuals can challenge the validity of EU law in front of national courts; see e.g. Case C-50/00 P *UPA*, EU:C:2002:462.

<sup>80</sup> Article 57(1) of the Convention provides that Contracting Parties might make reservations to the Convention. However it also provides that reservations of a general character are not allowed.

<sup>81</sup> ECtHR, *Mathews v. UK*, Judgment of 18 February 1999, Application No. 24833/94; see [Section 2\\_\(B\)](#) above.

<sup>82</sup> Opinion 2/13, para. 257. This issue is analysed by the Court at the end of the ruling in relation to the institutional/procedural issues. However, in the eyes of the author this also fits well, if not better, in the EU exceptionalism category.

### C. INSTITUTIONAL AND PROCEDURAL ISSUES

Lastly, the Court objected to several of the institutional arrangements put in place by the Draft Accession Agreement. For our purposes, those are less relevant since the Court's objections could be more easily accommodated in a new Accession Agreement. For the sake of completeness, however, the Court's main criticisms are illustrated. The Court objected to:

- The fact that no mechanism had been provided in the agreement to ensure that disputes between Member States or between the EU and Member States in relation to violation of the ECHR in fields covered by EU law would not be brought in front of the ECtHR.
- The co-respondent mechanism, insofar as the ECtHR would be able to assess the plausibility of the request by the EU or a Member State to join proceedings, since that would, in the eyes of the CJEU, require an interpretation by the ECtHR of EU law. In addition, the Court objected to the joint responsibility mechanism, whereby a Member State and the EU are to be held jointly responsible by the ECtHR. In the view of the Court, this might affect the guarantee in Article 2 Protocol 8 that accession should not affect the Member State's reservations made pursuant to Article 57 ECHR. This is the case even though the ECtHR (presumably to address exactly those concerns) might decide that only one of the co-respondents is to be held responsible. This provision is not only not considered sufficient to avoid an ECHR 'creep' in the Member States' reservations under Article 57 ECHR, but it is found problematic per se, since it implies a decision on the apportionment of responsibility between Member States and EU that would involve a decision as to the division of powers between the EU and Member States.
- The mechanism for the involvement of the CJEU. Here, the Court objected to two issues: first of all, the decision on the need for the involvement of the CJEU should rest with an EU institution and not with the ECtHR. Secondly, the agreement (or the interpretation thereof provided in the draft explanatory report) seems to exclude the possibility of consulting the CJEU on matters of interpretation of secondary legislation, therefore allegedly breaching the principle

that the Court of Justice has exclusive jurisdiction over the interpretation of EU law.

## **§5. THE FUTURE OF FUNDAMENTAL RIGHTS PROTECTION WITHOUT RATIFICATION OF THE ECHR**

It is interesting to note that most of the Court's objections relate to jurisdiction that the European Court of Human Rights already exercises. Thus, and as recalled above, the ECtHR already imposed some obligations on the exercise of discretion by the Member States in cases involving asylum seekers.<sup>83</sup> It has also already been clarified that the presumption of equivalent protection does not apply at all when the Court of Justice does not have jurisdiction, so that acts adopted within the context of the Common Foreign and Security Policy can presumably be attacked in front of the ECtHR.<sup>84</sup> Furthermore, the ECtHR has made it clear that the refusal to refer a case to the CJEU must be adequately reasoned or else there would be not only a breach of Article 6(1) ECHR but also a rebuttal of the presumption of equivalent protection.

It is to be hoped then that, pending the resolution of the stalemate created by Opinion 2/13, the European Court of Human Rights will be willing to protect fully the rights of those subject to EU rules, and, indeed, there are already indications that this might be the path that will be taken. Thus, Dean Spielmann, the President of the ECtHR, commenting on Opinion 2/13 made his disappointment at the ruling clear, and indicated that the ECtHR will step in to guarantee the protection of fundamental rights for EU citizens. He stated:

For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution.

Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations.

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<sup>83</sup> See Section 4(B) above; ECtHR, *M.S.S. v Belgium and Greece*, para. 342. ECtHR, *Tarakhel v. Switzerland*, Judgment of 4 November 2014, Application No. 29217/12; see also ECtHR, *Sharifi and Others v. Italy and Greece*, Judgment of 21 October 2014, Application No. 16643/09.

<sup>84</sup> See [Case C-50/00 P UPA](#) footnote 79 above.

The essential thing, in the end, is *not to have a hierarchical conception of systems that would be in conflict with each other. No, the key is to ensure that the guarantee of fundamental rights is coherent throughout Europe.*

For, let us not forget, if there were to be no external scrutiny, the victims would first and foremost be the citizens of the Union.<sup>85</sup>

In this respect, it should be noted that the *Bosphorus* doctrine is sufficiently flexible to allow for meaningful protection in pure EU law cases, ~~i.e. that is~~ in those cases where individuals are challenging acts of Member States adopted in order to implement a EU act (with no discretion left to the Member State), even without disposing of the doctrine of equivalent protection. After all, it would be sufficient for the European Court of Human Rights to give a slightly broader interpretation of what constitutes a manifest breach of the Convention.

As for the EU, the latter's political institutions (and its Member States) could decide to make a clear and unambiguous commitment to fundamental rights, without entering in a direct collision course with the CJEU.<sup>86</sup> It might be recalled that in 1977 the Commission, the Council and the European Parliament issued a joint declaration to signal their acceptance of the Court's case law on fundamental rights,<sup>87</sup> and their commitment to respect fundamental rights when acting at (then) EEC level. Similarly, the Charter of Fundamental Rights was proclaimed by the three institutions long before it acquired primary law status. The three political institutions could therefore issue a joint declaration restating their commitment to fundamental rights, and clarifying that they would consider a finding by the European Court of Human Rights of incompatibility between an act of the EU institutions and the Convention as binding; and they would act immediately to repeal and/or amend any offending instrument accordingly. Furthermore, a declaration of all Member States could undertake to do the same in relation to a potential conflict between a provision of primary law and the Convention. This would send a very important signal to our international partners as to the EU

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<sup>85</sup> ECtHR, 'President Dean Spielmann, Solemn hearing for the opening of the judicial year of the European Court of Human Rights, Opening Speech, 30 January 2015', *HUDOC* (2015), [http://www.echr.coe.int/Documents/Speech\\_20150130\\_Solemn\\_Hearing\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf), p. 5.

<sup>86</sup> L. Besselink, 'Acceding to the ECHR notwithstanding Opinion 2/13', *Verfassungsblog* (2014), <http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/>, has suggested that the EU should adopt a 'Notwithstanding Protocol', to allow it to accede to the Convention despite (or in spite) of Opinion 2/13. Such a Protocol would read: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014'. I am not entirely persuaded that even if feasible this solution would be wise: an open conflict between the judicial and the executive branches is always best avoided.

<sup>87</sup> Joint Declaration of the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1977] OJ C 103/1.

commitment to fundamental rights protection. Even if for the time being, the EU is not in a position to formally accede to the ECHR, nothing prevents it from deciding that it would consider itself bound by the Convention *and* by the rulings of the ECtHR. The ensuing situation might even be preferable to Accession, as in many ways simpler from a practical and constitutional viewpoint; at a stretch it could be argued that such an arrangement, albeit informal, would satisfy the obligation in Article 6(2) TEU.

Finally, such a declaration would also send a very strong message to both Courts: to the ECtHR to continue in its role of guarantor of fundamental rights for the entire territory of the Council of Europe; to the Court of Justice to take judicial comity and fundamental rights protection rather more seriously than it has done so far.

## **§6. CONCLUSION**

There are very cogent reasons why the EU should accede to the Convention, and it is extremely disappointing that the Court of Justice, in a ruling which seems more focused on protecting its own prerogatives than it is in protecting fundamental rights (or even the EU constitutional structure), has made accession very unlikely in the near future. It is to be hoped that the political institutions and the ECtHR will act to fill the gap left by the Court's ruling. This is far from an ideal solution, and yet a clear message needs to be sent both externally and internally: the EU is a community based on fundamental values, and fundamental rights are paramount amongst those. If there is a political will to subject the EU to external scrutiny, there is a way to do so even lacking accession. In the meantime, it is to be hoped that the Court's ill-considered judgment will not create irreparable damage to the EU's willingness to commit to fundamental rights.